Matrix Intl. Textile, Inc. v Zipes
2014 NY Slip Op 31435(U)
May 30, 2014
Sup Ct, New York County
Docket Number: 653223/2013
Judge: Eileen A. Rakower
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MATRIX INTERNATIONAL TEXTILE, INC.,

Plaintiff,

Index No. 653223/2013

- against -

Decision and Order

JEFFREY ZIPES, DMD INTERNATIONAL, LTD., DMD INTERNATIONAL IMPORTS, LLC, JEFFREY CRAIG, LTD. and JEFFREY CRAIG IMPORTS, LLC,

Mot. Seq.: 01

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Matrix International Textile, Inc., ("Plaintiff" or "Matrix") brings this action to recover funds allegedly owed for finished fabric (the "Fabric") which Plaintiff sold and delivered to defendants, Jeffrey Zipes ("Zipes"), DMD International, Ltd., DMD International Imports, LLC ("DMD Imports"), Jeffrey Craig, Ltd., and Jeffrey Craig Imports, LLC ("JC Imports") (collectively, "Defendants"), at various times throughout 2010-2012. Plaintiff claims to have provided Defendants with an invoice reflecting the terms of sale for each such delivery, that Defendants accepted and retained the Fabric without objection or complaint, and that Defendants failed to pay these invoices in full. Plaintiff asserts causes of action for breach of contract, account stated, reasonable value of goods sold and delivered, unjust enrichment, and fraud.

Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1), (a)(3), and (a)(7), dismissing Plaintiff's complaint on the basis of documentary evidence, lack of capacity, and failure to state a claim upon which relief may be granted.

[* 2]

Plaintiff opposes.

CPLR § 3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
>> (3) the party asserting the cause of action has not legal capacity to sue;

Section 1312(a) of the New York Business Corporations Law ("BCL") provides:

> A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees [fig 1] and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation. This prohibition shall apply to any successor in interest of such foreign corporation.

"Section 1312(a), which denies an unauthorized foreign corporation 'doing business' in this state capacity to sue here, employs a heightened 'doing business' standard . . . the party seeking to impose the barrier, in order to rebut the presumption that the corporation does business in its state of incorporation rather than New York, has the burden of proving that the foreign corporation's activity in New York is systematic and regular." (*Airtran N.Y., LLC v. Midwest Air Group, Inc.*, 46 A.D.3d 208, 214 [1st Dep't 2007]) (citation omitted).

"Whether a foreign corporation is doing business within the purview of this section so as to foreclose access to our courts depend on the particular facts of each case with inquiry into the type of business being conducted. In connection with such determination it is to be recognized that, while some activities might constitute 'doing business' pursuant to CPLR § 301 and so subject a foreign corporation to the jurisdiction of New York courts, such a finding would not necessarily render a

corporation liable to the qualification requirements of this section. (*Von Arx A.G. v. Breitenstein* 52 A.D.2d 1049 [4th Dept 1976])." (*Repair Tech Inc. v. Zakarin*, 8 Misc. 3d 1022(A), 1022A (N.Y. Sup. Ct. 2005).

"[I]t is well established that the solicitation of business and facilitation of the sale and delivery of merchandise incidental to business in interstate and/or international commerce is typically not the type of activity that constitutes doing business in the state within the contemplation of section 1312(a)." (*Digital Ctr., S.L. v. Apple Indus., Inc.*, 94 A.D.3d 571, 572 [1st Dep't 2012]) (citation omitted).

"If, on the other hand, the foreign corporation is engaged in local business on more than an isolated or accidental basis, it must comply with the statute." (*Paper Mfrs. Co. v. Ris Paper Co.*, 86 Misc. 2d 95, 98 [N.Y. Civ. Ct. 1976]).

Defendants argue that Plaintiff lacks capacity to bring this action because Plaintiff is an unauthorized foreign corporation "doing business" in New York. Defendants argue that Plaintiff maintains an active presence in New York, including an office, located at 525 Fashion Avenue, New York, New York, 10018, and a sales force. Defendants argue that Plaintiff derives substantial revenue from its business activities in this State, that Plaintiff made deliveries to New York, that Plaintiff's president came to New York to solicit sales, and that Defendants contacted Plaintiff's New York office to place purchase orders.

Plaintiff concedes that it maintains a small, shared office space in New York, and that it uses the services of "no more than three" sales representatives in New York.

Accordingly, despite Plaintiff's contention that its presence in New York is incidental to its business in interstate and international commerce as a wholesale manufacturer and converter of fabric, Defendants meet their burden of demonstrating that Plaintiff is engaged in local business on more than an isolated or accidental basis, and that, as such, Plaintiff must comply with BCL § 1312(a).

"Although plaintiff's complaint is thus subject to dismissal, dismissal should [be] conditioned upon plaintiff's failure to establish within a reasonable time that it had complied with Business Corporation Law § 1312 (a)." (*Showcase Limousine, Inc. v Carey*, 269 AD2d 133, 134 [1st Dep't 2000]).

Accordingly, this Court will provide a reasonable period of time for Plaintiff to comply with BCL § 1312(a). "In the event that [Matrix] ultimately fails to establish its compliance with BCL § 1312 within a reasonable period of time, this Court must dismiss the action." (*Credit Suisse Intl. v URBI, Desarrollos Urbanos, S.A.B. DE C.V.*, 41 Misc. 3d 601, 604 [N.Y. Sup. Ct. 2013]).

Wherefore it is hereby,

ORDERED that Defendants' motion to dismiss is denied without prejudice; and it is further

ORDERED that Plaintiff is directed to establish its compliance with BCL § 1312(a) within sixty (60) days of service of this Order with notice of entry; and it is further

ORDERED that Defendants may renew this motion after the expiration of the sixty (60) days to seek dismissal of this action.

This constitutes the decision and order of the Court. All other relief requested is denied.

Dated: May 30, 2014

Eileen A. Rakower, J.S.C.